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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1934

ATLANTIC COAST LINE RAILROAD COMPANY,

Appellant,

vs.

No. 344

STATE OF FLORIDA and E. S. MATTHEWS, MAMIE EATON-GREENE, and W. B. DOUGLASS, ETC., et al.,

Appellees.

STATE OF FLORIDA and E. S. MATTHEWS, MAMIE EATON-GREENE, and W. B. DOUGLASS, ETC., et al.,

Cross-Appellants,

vs.

No. 345

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,

Cross-Appellees.

Supplemental Brief of Appellees and Cross-Appellants

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THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,

Cross-Appellees.

Supplemental Brief of Appellees and Cross-Appellants

At the time of the preparation of our main brief we had not received any brief from the appellant and cross-

appellee, Atlantic Coast Line Railroad Company. That Company has now filed two briefs, one dated January 7th, 1935, and one dated January 2nd, 1935.

The points argued on behalf of the Railroad in its main brief (dated January 7, 1935) are stated somewhat differently from its "Points" filed with and embodied in the record (R. 440-443). And we respectfully suggest that in some instances the former are substantially broader than the latter, and broader than the Railroad's Assignments of Error and so have not been fully discussed in our main brief. Those we propose to discuss briefly here; and upon others which have been met we propose to present further authorities.

ARGUMENT

SUMMARY

The points which will be argued in this brief are as follows:

POINT I.

The District Court, After Receiving the Mandate of this Court, Rightly Refused to Enjoin the Enforcement of the Cummer Scale of Rates.

POINT II.

The District Court, in Connection with the Restitution Here Awarded, Rightly Refused to Permit Collection by the Railroad of any Alleged Undercharges Arising from Shipments Made After the Cummer Scale Again Became Effective.

POINT III.

The Decree of the District Court was Not Upon a Different Theory from that Presented by the Pleadings and Evidence,

POINT IV.

Restitution Is a Matter of Right and Not of Grace.

POINT V.

The District Court Should Have Made No Inquiry as to the Reasonableness of the Cummer Scale of Rates.

POINT VI.

Neither the Injunction of the Circuit Court of Appeals nor the Orders of the Florida Railroad Commission Constitutes any Reason Why the Cummer Scale Should not be Used as the Measure of Restitution.

POINT VII.

The District Court and the Master Found that the Burden of Proof was on the Complainants to Show "what should in right and justice be restored to them, the case standing much as though they were suing in a Court of Law for overcharges." The District Court found that this Burden had Been Met.

POINT VIII.

Both the Master and the District Court in Measuring and Awarding Restitution Took into Consideration the Element of Discrimination Against Interstate Commerce.

POINT IX.

There is No inconsistency in the Opinions of the District Court.

POINT X.

The Order of the Interstate Commerce Commission in the Re-opened Proceeding, After the Time of the Shipment of the Logs here Involved, fixing the Rates for the Future and the Subsequent Decisions of the Courts Upholding that Order can have no Retroactive Effect Upon the Restitution to be Awarded Here.

POINT I.

THE DISTRICT COURT, AFTER RECEIVING THE MANDATE OF THIS COURT, RIGHTLY REFUSED TO ENJOIN THE ENFORCEMENT OF THE CUMMER SCALE OF RATES.

The appellant in its brief of January 7, 1935, (pages 55-64) makes the point that after this Court by its opinion (*State of Florida* v. *United States*, 282 U. S. 194) determined the order of August 2, 1928, of the Interstate Commerce Commission to be invalid and unlawful and after this Court sent down its mandate in that case to the District Court, that Court should have enjoined the enforce-

ment of the Cummer Scale of rates. It bases this contention upon the fact that the Interstate Commerce Commission had been petitioned to re-open the proceedings before it and did re-open those proceedings, and upon the fact that the District Court afterwards determined the Cummer scale of rates to be confiscatory and the assertion that that Court could have enjoined those rates as a condition to awarding restitution.

We first point out that even if the District Court had enjoined the future application of the Cummer Scale at the time of the order here complained of, (July 31, 1931), or at the time of the making of the railroad's motion (March 7, 1931), it could have no effect upon the decree here appealed from which involves only shipments made prior to March 7, 1931. But the contention is wholly without merit, as we shall briefly demonstrate.

(a) The Limited Jurisdiction of the District Court.

The Federal Courts will not enjoin the enforcement of intrastate rates pending the determination by the Interstate Commerce Commission as to whether those rates cause an undue or unreasonable discrimination against interstate commerce:

Board of Railroad Commissioners of the State of North Dakota v. *Great Northern Ry. Co.*, 281 U. S. 421.

That case was decided where the Court was exercising plenary equity jurisdiction. The specially constituted statutory Court here involved was a court of limited jurisdiction. Thus in the case of

Pittsburgh etc. R. Co. v. *United States*,
281 U. S. 479,

an attack was made upon an order of the Interstate Commerce Commission and likewise the Wheeling Railroad was joined as a defendant, and an injunction sought against it to prevent it from exercising the authority granted by the order of the Commission, because of alleged illegal conduct on the part of the directors of that railroad. This Court there said with respect to this latter relief so sought:

> "An application for such relief may not be included in a bill under the Urgent Deficiencies Act to set aside an order of the Interstate Commerce Commission. Compare Cleveland, C. C. & St. L. R. Co. v. United States, 275 U. S. 404, 414, 72 L. ed. 338, 344, 48 Sup. Ct. Rep. 189; Great Northern R. Co. v. United States, 227 U. S. 172, 181, 72 L. ed. 838, 841, 48 Sup. Ct. Rep. 466. It is neither ancillary to nor dependent upon the judgment as to the order. Relief of that character may be had only in a suit invoking the plenary equity jurisdiction of the district court. Such a suit would be heard in ordinary course by a single judge; and it would be appealable only to the circuit court of appeals."

See also:

Standard Oil Co. v. *United States*,
41 F. (2d) 836;
Proctor & Gamble v. *United States*,
225 U. S. 282.

Clearly the relief which the District Court could grant in this suit was limited to enjoining, setting aside or annulling in whole or in part an order of the Interstate Commerce Commission, and to matters ancillary to or dependent upon the judgment of the Court as to such order of that Commission.

The granting of the restitution here sought was ancillary to and dependent upon the judgment of the Court and within the jurisdiction of the Court:

Baltimore & Ohio R. Co. v. *United States*,
279 U. S. 781;
Northwestern Fuel Co. v. *Brock*,
139 U. S. 216.

(b) **This Court had Already Denied the Motion of the Railroad Company to the Same Effect.**

The former appeal to this Court was from a final decree upon the merits, and this Court in its opinion and mandate specified the final disposition that was to be made upon the merits.

When once the merits of a case have been decided by the Supreme Court on appeal the Court below had no au-

thority without leave of the Supreme Court to grant a new trial, a rehearing, or a review, or to permit any new defenses on the merits:

In Re Potts & Co., 166 U. S. 263;
In Re Sanford Fork & Tool Co., 160 U. S. 247.

We have referred in our main brief to the fact that the Atlantic Coast Line Railroad Company, (apparently) in recognition of this rule of law, filed in this Court after the coming down of the opinion of this Court, a motion praying that the mandate be withheld or be so framed as to permit the District Court to "maintain the status as to intrastate rates existing until said (Interstate Commerce) Commission shall have acted or until said Court for other cause shown shall have otherwise ordered". Among the grounds given by that motion was the low level of the state rate and that the carrier would be subjected to claims made by and on behalf of the Florida shippers for reparations or restitution.

This Court by its order promptly denied the carrier's motion and thereupon sent down the mandate. If the carrier had any reasons other than those presented to this Court why the District Court should be left free to deal with the state rate it should have then presented those reasons to this Court. The denial of that motion presented to it by the carrier constitutes a second determination upon the merits and concludes the contention here made, as well as all defenses upon the merits on the part of the carrier.

POINT II.

THE DISTRICT COURT, IN CONNECTION WITH THE RESTITUTION HERE AWARDED, RIGHTLY REFUSED TO PERMIT COLLECTION BY THE RAILROAD OF ANY ALLEGED UNDERCHARGES ARISING FROM SHIPMENTS MADE AFTER THE CUMMER SCALE AGAIN BECAME EFFECTIVE.

After the mandates of this Court were received by the District Court it entered its orders (R. 53-56) on March 7, 1931, making those mandates the judgments of the District Court and enjoined, set aside and annulled the order of the Interstate Commerce Commission. Thereafter the Cummer Scale was again enforced in Florida for the transportation of logs. The contention made by the railroad is that it should have been permitted to claim undercharges with respect to the transportation of those logs and recover on its claim in this proceeding. Its principal contention here is that it would have to go into another jurisdiction and another forum to sue for these alleged undercharges when the District Court refused permission to collect the alleged undercharges. The argument above set forth with respect to the jurisdiction of the District Court under Point I is equally applicable here. Furthermore it is not contended that the right to maintain suit for the alleged undercharges in another jurisdiction and another forum, viz, in the courts of Florida, was impaired by the decision of the District Court.

But the railroad asserts that this is a proceeding in equity and that these alleged undercharges could be set up as a set-off or counterclaim under the Federal Equity Rules. Even if this were a proceeding in equity before a court of plenary equity jurisdiction, we point out that the collection

of undercharges is by an action *at law* in Florida, the declaration upon the common counts being appropriate:

Cullen v. *Seaboard Air Line Ry. Co.*,
63 Fla. 122, 58 So. 182.

And a counterclaim or set-off which is legal in its nature cannot be set up under those Rules. It must be such a claim as could be the subject matter of a separate suit *in equity*.

American Mills v. *American Surety Co.*,
260 U. S. 360.

Obviously the alleged counterclaim had no proper place here, even if this had been a court exercising plenary equity jurisdiction.

POINT III.

THE DECREE OF THE DISTRICT COURT WAS NOT UPON A DIFFERENT THEORY FROM THAT PRESENTED BY THE PLEADINGS AND EVIDENCE.

When the District Court in its first opinion found the Cummer Scale of rates to be confiscatory and on that account refused to use it as the measure of restitution, it re-referred the matter to the Master, saying (R. 172):

> "Under the special circumstances of this case we adjudge that the claimants of restitution should have the same only upon condition that they submit to an investigation of the true rights

> of the carrier to collect for the transportation of their logs during the period covered by the restitution, and submit to such an adjudication as will justly and finally settle the accounts between such claimants and the carrier."

Under that re-reference the carrier insisted that it was the intention of the District Court to cut off the right of the claimants to appeal from the decision of the District Court that the Cummer Scale was inapplicable as the measure of restitution and to require an abandonment of that contention in all courts before proceeding further in the case (R. 738-741).

The position of the claimants was stated by counsel to be (R. 741):

> "We don't waive any error. We are proceeding under the order and according to the order, as we must, and we want to be perfectly and thoroughly understood that we don't waive any errors that the Court may hitherto have made in this or any other hearing. In other words, we will conform to the order of the Court with right of appeal."

That same contention is made here by the carrier and it is contended that the claimants had two trials, one on the right to restitution on the basis of the Cummer Scale, and the other on the right to restitution on the basis of the common law standard of reasonableness. It is contended that the claimants did not proceed in accordance with the

condition contained in the order of the District Court and that the decree is therefore nugatory. We shall briefly examine this contention.

(a) No Formal Pleadings of Any Sort Were Necessary to Entitle the Claimants to Restitution.

Ordinarily restitution is allowed upon a mere motion. In no case have we found that any sort of motion or petition has been held to be insufficient to support the award. In the case of

Northwestern Fuel Company v. *Brock*,
139 U. S. 216,

the Court reviewed the authorities, including *The Bank of the United States* v. *Washington*, 6 Pet. (U. S.) 8, to the effect that where the plaintiff had execution and it was levied and the money paid, the opposite party might have restitution without a scire facias because the sum is certain, and that in other instances a scire facias might be necessary to ascertain what is to be restored.

The Court then reached the following conclusion (text 220):

> "We are of opinion that the proceeding to enforce the restitution in the cases mentioned is under the control of the court, and that all needed inquiry can be had to guide its judgment in a summary proceeding upon motion of the parties, *the*

only requisite being that the opposite party shall be heard so that in directing restitution no further wrong be committed.". (Italics ours).

Obviously no formal pleadings are required, for it is the *duty* of the Court to make restitution and thus right the wrong which has resulted from its erroneous decree. There is and can be no contention made that the opposite party, the Railroad, was not heard at large and at length here.

(b) **The Motions and Responses in the Restitution Proceeding.**

The motions for restitution (R. 7, 11 and 15) set up the reversal by this Court of the decree of the District Court, the exaction of large sums of money from the claimants respectively for the transportation of logs under color of the unlawful order of the Interstate Commerce Commission upheld by the decree of the District Court, and demand restitution thereof. They then claim restitution of the difference between the lawful state rate (which the District Court thereafter found to be the prima facie lawful state rate) and the amount exacted. Reference to a Master was prayed "for the ascertainment of the amount of restitution properly to be made by the Atlantic Coast Line Railroad Company to the several complainants". Each motion concluded (paragraph IV, R. 10) paraphrasing the language of the mandate of this Court as follows:

"The Complainants further move the Court to retain jurisdiction of this cause and of the parties

hereto, to the end that such other and further proceedings may be had, and such other and further orders and decrees may be entered with respect to restitution, costs and any and all other proper matters as are according to right and justice and the laws of the United States."

The Railroad Company, by its responses, asserted the confiscatory level and invaljdity of the Cummer Scale, and itself invoked the power of the Court, praying (R. 43):

"To the end that multiplicity of suits may be prevented, that all persons at interest be restrained and enjoined from undertaking to enforce any overcharges or claims of restitution against this respondent on account of the matters and things mentioned in said motion or in this response *except in this proceeding and before this Court under such circumstances as this Court may deem proper.* (Italics ours).

* * *

"This court enter such other and further orders as may be meet and proper to the end that right and justice be done in this cause in accordance with the opinion of the Supreme Court of the United States and the mandate issued therefrom, insofar as said opinion and mandate are applicable thereto, and that this respondent have general relief as to all of the matters and things herein mentioned".

The Court found that the Cummer Scale was the prima facie measure of restitution (R. 167). Obviously if no defense had been made it would have been the measure of restitution to have been employed. Putting to one side the general prayer for restitution, we point out that even if the claimants had been only insisting that the Cummer Scale was the proper measure, the measure of restitution was a matter of evidence. And the Railroad Company not only defensively asserted the invalidity of the Cummer Scale but also became in effect an actor in invoking the power of the Court to enjoin the claimants from proceeding elsewhere than in that Court and requested the entry of such other and further orders as might be proper to carry out the terms of the mandate.

(c) The Motion for Restitution was Construed as Praying Relief in the Alternative, and Therefore No Election of Remedies or Waiver of Error Could Arise.

The District Court, in its opinion re-referring the cause found (R. 161):

> "The claimants contend that they are severally entitled to have restitution measured by the Cummer Scale, it being a rate voluntarily established and approved by the Florida Commission, the court having no power to go behind it; but if not, that the master should be, directed to measure it by the common law standard."

The Court having construed the motion for restitution as praying relief in the alternative no question of waiver of error or election of remedies can arise. For the law is well settled that when a claimant prays for relief in the alternative and primary relief is denied and part or all of the subordinate relief is granted, the claimant has a right in the appellate court to insist that the primary relief should have been granted. See the case of

In Re Pacat Finance Corp., 27 F. (2d) 810,

where the Court said:

> "It is true that the theory of an express trust by reason of appropriation of lire for Berardini's account was found against him by the first master, and his report was confirmed in this respect by the order of October 10, 1923, which allowed Berardini to proceed further on the theory of tracing money. This order, however, expressly stated that its provisions were interlocutory only, and that jurisdiction was retained until the coming in of the second report and action thereon by the court. Consequently it was not a final and appealable order, and we do not see how it can bar Berardini from urging that on the record before us he has proved an express appropriation of lire for his account. See Buckingham v. McLean, 13 How. (U. S.) 150, 14 L. Ed. 91; Buster v. Wright, 135 F. 947, 959 (C. C. A. 8)."

An appeal from a final decree in equity brings up for review all interlocutory orders preceding that decree in the Court below:

Buckingham v. *McLean*, 13 How. (U. S.) 150;
Kendall v. *Ewert*, 259 U. S. 139;
Perkins v. *Fourniquet*, 47 U. S. 206.

Obviously, therefore, the effect of the order of the District Court could not be to cut off the right of these claimants to appeal from the decision of that Court that the Cummer Scale was not the proper measure of restitution, even if that Court had intended to deprive the claimants of their right of appeal.

(d) **The Fourth Paragraph of the Motions for Restitution was Sufficient Alone to Support a Decree Upon the Theory of Quantum Meruit.**

We have pointed out that by paragraph four of the motions for restitution, the claimants further moved the Court for such further proceedings and orders with respect to restitution as might be "according to right and justice and the laws of the United States". That language paraphrases the mandate of this Court, asking for such restitution as the claimants are entitled to, and is equivalent to a prayer for general relief.

The law is well settled that where a formal pleading contains a special prayer for a particular sum of money and a prayer for general relief, the latter will support a decree

for less than the full amount claimed in the special prayer:

United States v. *Tenn. & C. R. Co.*,
176 U. S. 242;
Lockhart v. *Leeds*, 195 U. S. 427.

The contention that the decree entered is not supported by the pleadings is refuted by the pleadings themselves and the construction which the District Court placed upon them.

(e) The Decree of the District Court Supersedes any Prior Ambiguities.

In its final opinion the District Court pointed out that the parties were before the Court and that much time had been taken and much expense incurred in investigating this matter (R. 349). The record discloses that the issue was most thoroughly tried. The District Court therefore, after commenting upon the disagreement of the Court as to whether there had been a requirement that the claimants abandon the right to claim recovery on the basis of the Cummer Scale, said (R. 350):

> "In view of this disagreement we cannot decide the point. But it is immaterial in this Court, since all three Judges concur in the opinion that the Cummer Scale is not available to measure restitution because it is confiscatory and void as an enforced rate".

Thereafter the Court entered its decree (R. 383) awarding the restitution allowed to the complainants. The entry of

that decree construes and supersedes any ambiguity, if there ever had been any, in the pleadings or in the opinion of the District Court.

POINT IV.

RESTITUTION IS A MATTER OF RIGHT AND NOT OF GRACE.

The Railroad here contends, as the District Court found, that restitution is not a matter of right, but of grace, or judicial discretion. In support of that proposition it cites two Missouri and one Nebraska State court cases (pages 79-81 of brief of January 7, 1935).

We have pointed out in our main brief the restitution cases in this Court, viz:

Northwestern Fuel Co. v. *Brock*,
139 U. S. 216;
Arkadelphia Milling Co. v. *St. Louis, S. W. Ry.*, 249 U. S. 134;
Ex Parte Lincoln Gas & Elec. Co.,
256 U. S. 512; (S. C.) 257 U. S. 6; and
Baltimore & Ohio R. Co. v. *United States*,
279 U. S. 781.

And we have shown that no investigation of the merits was permitted in those cases. Thus the holding in the case of Northwestern Fuel Co. v. Brock, supra, where the judgment was entered upon the merits and reversed for want of jurisdiction and restitution nevertheless awarded, will not comport with any view that restitution is ex gratia.

Many cases directly hold that restitution is a matter of right:

Lytle v. *Lytle*, 94 N. C. 522;
Perry v. *Tupper*, 71 N. C. 385;
Bickett v. *Garner*, 31 Ohio St. 28;
Florence Cotton etc. Co. v. *Louisville Banking Co.*, 138 Ala. 588, 36 So. 456;
Ex Parte Walter Bros., 89 Ala. 237, 18 Am. St. Rep. 103;
Haebler v. *Myers*, 132 N. Y. 363, 30 N. E. 963, 15 L. R. A. 588.

Whether it be termed a matter of right or of grace, the thing to be remembered is that it is the *duty* of the Court. And the Court can have no higher duty than to right the wrongs which it has itself done. For this reason the Courts have, with rare exceptions, when called on for restitution, first performed their duty by restoring all that was lost because of the erroneous decree and thereafter permitted the parties to litigate their controversies upon the merits.

POINT V.

THE DISTRICT SHOULD HAVE MADE NO INQUIRY AS TO THE REASONABLENESS OF THE CUMMER SCALE OF RATES.

The Railroad makes the point that the Florida Railroad Commission has no jurisdiction to prescribe an unjust or unreasonable rate and that the carrier has the right to show that any such rate is unjust and unreasonable. The

Constitution of the United States will permit no regulatory body to enforce a confiscatory rate prescribed for future applications by a public servant. But this does not mean that in restitution proceedings the Court should consider the reasonableness of the State rate which was superseded by the unlawful order of the Interstate Commerce Commission which in turn the District Court erroneously refused to set aside. That matter should no more have been the subject of investigation here than was the validity and existence of the obligation upon which the defendant was sued in the case of *Northwestern Fuel Company* v. *Brock*, supra, or the level of the rate fixed by city ordinance during the restitution proceedings in *Ex parte Lincoln Gas & Electric Co.*, supra. The argument which we have made under Points I to III above, and Points 1 to 6 of our main brief is applicable to this point.

POINT VI.

NEITHER THE INJUNCTION OF THE CIRCUIT COURT OF APPEALS NOR THE ORDERS OF THE FLORIDA RAILROAD COMMISSION CONSTITUTES ANY REASON WHY THE CUMMER SCALE SHOULD NOT BE USED AS THE MEASURE OF RESTITUTION.

The Railroad here contends that the Cummer Scale was suspended by the injunction of the Circuit Court of Appeals and by orders of the Florida Railroad Commission. None of the points intended to be relied on by the Railroad raised this issue, nor are any of the assignments of error of the Railroad applicable to it. In arguing this point it will be necessary to briefly state the facts as to that injunction and those orders.

The original opinion of the District Court, dated January 17, 1929, *(30 Fed. (2d) 116)*, construed the order of the Interstate Commerce Commission as being limited to the Northern part of Florida, and as so construed upheld it. Following that construction, the Florida Railroad Commission adopted its order number 979 declaring that so long as the decision of the Court remained in force and unreversed the order of the Commission should be applicable to the Northern portion of Florida, to which the decision of the District Court had limited it, and that otherwise the Cummer Scale of rates should remain in full force and effect.

The Florida Railroad Commission then brought suit in the State Court of Florida, alleging that the Atlantic Coast Line Railroad was threatening to charge the rates prescribed by the order of the Interstate Commerce Commission between all points in Florida, and an injunction was sought and obtained against the charging of these rates except in the portion of Florida to which the decision of the District Court and order number 979 limited the application of the order of the Interstate Commerce Commission. The Railroad sought to remove the case to the Federal Court and likewise brought in the Federal Court in Florida a suit which was alleged to be in aid of the jurisdiction of that Court and for the purpose of restraining the State Court from proceeding in the case above mentioned. This latter suit in the Federal Court was dismissed and an appeal allowed.

In connection with the appeal an order was obtained, without notice, from the United States Circuit Court of Appeals for the Fifth Circuit restraining the Florida Rail-

road Commission from *enforcing* its above mentioned order No. 979 and the above mentioned injunction order of the State Court (the Circuit Court of Duval County) and the case set down for February 21, 1929, for the Florida Commission to show cause why an injunction should not issue. A return to the above mentioned rule was filed by the Florida Railroad Commission, and upon hearing on February 21, 1929, the Circuit Court of Appeals took the matter under consideration. No injunction was ever issued.

No order was entered and no further proceedings had in that case until on March 19, 1931, after the decision of this Court declaring the order of the Interstate Commerce Commission invalid, the Florida Commission filed a motion to dissolve the temporary restraining order. On March 30, 1931, the Circuit Court of Appeals entered its order dissolving the temporary restraining order.

Subsequently the Circuit Court of Appeals on January 6, 1932, dismissed the appeal and the case and taxed the costs against the Atlantic Coast Line Railroad Company.

At the same time it filed the above mentioned suit in the United States District Court for the Southern District of Florida, viz, February 6, 1929, the Atlantic Coast Line filed in the United States District Court for the Northern District of Florida a suit against the Florida Railroad Commission alleging that the order of the Interstate Commerce Commission was applicable throughout the State of Florida and seeking to enjoin the defendants therein from enforcing the above mentioned order No. 979 of the Florida Railroad Commission (which provided that the Cummer scale of rates was applicable to and should be enforced in the State of Florida except in the Northern part of Florida to

which the decree of the District Court for the Northern District of Georgia had construed the order of the Interstate Commerce Commission to be applicable). The defendants by answer set up the proceedings in the District Court for the Northern District of Georgia and the construction which that Court had placed on the order of the Interstate Commerce Commission, and averred that order No. 979 was entered in pursuance of that construction and in recognition of the paramount power of federal authority. The injunction was denied and the bill of complaint dismissed on February 8, 1929, the Court finding that the action of the Florida Railroad Commission complained of was outside the scope, operation and effect of the order of the Interstate Commerce Commission. The matter was heard and the dismissal entered by Judge William B. Sheppard of the Northern District of Florida.

The Atlantic Coast Line then filed a proceeding in this Court to mandamus Judge Sheppard to call two other judges to his assistance and then pass upon the suit just mentioned, the petition for mandamus asserting that the denial of the injunction and the dismissal of the bill could not be effective when passed upon by anyone other than a statutory three-judge court. This Court decided that Judge Sheppard should call together a three-judge Court to decide whether or not an injunction should issue in the above mentioned case in the United States District Court for the Northern District of Florida. The opinion is reported as *Ex Parte Atlantic Coast Line Railroad Company*, 279 U. S. 822. Judge Sheppard entered an order setting aside his former order and calling together a three-judge court. A supplemental answer was filed in this case in which the Florida Railroad Commission set up the amendment by the

Interstate Commerce Commission of its order so as to make it applicable "within and throughout the State of Florida," and the fact that the order as so amended had been diligently attacked in the District Court for the Northern District of Georgia and upheld by that Court. The Florida Railroad Commission further averred that it had thereupon entered its order No. 990 (hereinafter further described) which suspended said order No. 979 so long as the decree of the District Court for the Northern District of Georgia remained in force and effect and unmodified and unreversed. The Florida Commission further therein averred that it had taken an appeal to the Supreme Court of the United States, and

> "* * * that in the event the said decree of said United States District Court for the Northern District of Georgia shall be reversed and said order of the Interstate Commerce Commission be enjoined, annulled and set aside in whole or in part insofar as said order affects intrastate rates on logs in Florida, then and in such event these defendants as Railroad Commissioners of Florida, on behalf of the several shippers of Florida affected by said order, will recoup or recover or will assist such shippers to recoup or recover all sums paid by such shippers or charged or collected by said complainant for the transportation of logs by the complainant in excess of the intrastate scale of distance rates attacked in said proceedings before the said Interstate Commerce Commission; but so long as the said decree of the said United

States District Court for the Northern District of Georgia, Atlanta Division, shall remain in force and effect and unmodified and unreversed these defendants as Railroad Commissioners, as in duty bound they ought to do, will abide the terms of said decree."

The three-judge court assembled and made an order denying the injunction prayed without prejudice to any new application if necessity therefor should thereafter arise. No further proceedings were had in that suit.

We thus had a suit in the Circuit Court of Duval County, Florida, a suit in the United States District Court for the Southern District of Florida with an appeal to the Circuit Court of Appeals, and a suit in the United States District Court for the Northern District of Florida with a mandamus proceeding in the Supreme Court, all arising out of the construction which the District Court placed upon the order of the Interstate Commerce Commission in construing it as applicable to the Northern portion of Florida.

Meanwhile the Interstate Commerce Commission on February 7, 1929 (the day before the effective date of its invalid order) purported to amend its order so as to make it effective "within and throughout the entire State of Florida" (Former Record 90-91). These claimants by supplemental bills attacked the order as so amended in the District Court for the Northern District of Georgia, and that Court upheld the order as so amended (31 F. (2d) 580).

When the District Court by that opinion and decision sustained the order of the Interstate Commerce Commis-

sion as amended and as applicable, "within and throughout the State of Florida, without exception," the Florida Railroad Commission, recognizing the supremacy of Federal power as embodied in the order of the Interstate Commerce Commission sustained by that Court, on April 20, 1929, entered of record, without notice or hearing, an order (Number 990) evidencing such recognition.

Order No. 990, after declaring the decision of the District Court and the opinion of the Florida Railroad Commission that that decision is erroneous, declared the determination of the Florida Railroad Commission to appeal therefrom to the Supreme Court of the United States to the end that the order of the Interstate Commerce Commission be enjoined, annulled and set aside, but asserted that the Florida Railroad Commission recognized that the decision of that Court was the law of the land until the same was modified, set aside or reversed. And it ordered that order No. 979 and the distance scale of commodity rates in force and effect under the authority of the State of Florida on and prior to February 7, 1929, for the transportation of logs, except walnut, cherry and cedar, between points on the Atlantic Coast Line Railroad in Florida, be and the same were thereby suspended "so long as the said decree of said United States District Court for the Northern District of Georgia shall remain in force and effect and unmodified and unreversed."

After the Supreme Court had reversed the decree of the District Court, the Florida Railroad Commission on March 5, 1931, after notice to the Railroad Company and to the parties interested, entered its order No. 1032 (R. 21-26). The purport of that order is that the Cummer Scale

of rates had been published long prior to February 8, 1929, as required by the laws of the State of Florida and thenceforward and thereafter maintained as required by its laws, that no application had been made to increase or modify that scale of rates and the Florida Railroad Commission had never approved or consented to any increase or modification of it, and that at all times that scale of rates had been and still was in force and effect, notwithstanding the unlawful and invalid order of the Interstate Commerce Commission and notwithstanding the erroneous decree of the District Court, and that the Florida Railroad Commission had never suffered or permitted the scale of rates prescribed by the Interstate Commerce Commission to be applied or abstained from the enforcement of the application of the Cummer Scale of rates "except during the period and to the extent that this Commission has been compelled so to do by the erroneous decrees of the said United States District Court for the Norhern District of Georgia, Atlanta Division, in said suit." The order then recites that to the extent that the Atlanic Coast Line Railroad Company has collected rates in excess of the Cummer Scale of rates it has exacted overcharges for the transportation of logs, and that divers shippers have demanded that the Commission take such action as shall cause restitution to be made to them of such overcharges. It is then ordered that the lawful rates for the transportation at all times since February 7, 1929, and prior thereto, is and was the Cummer Scale of rates and that no other rates are or at any time since February 7, 1929 have been lawful. It is further ordered that proceedings to secure restitution for the shippers be instituted.

(a) The Temporary Restraining Order Issued by the Circuit Court of Appeals Can Furnish no Aid or Protection to the Atlantic Coast Line Railroad Company Against the Claims for Restitution Here Made.

We have shown that the restraining order just mentioned was the direct outgrowth of the construction placed by the District Court in its first opinion upon the order of the Interstate Commerce Commission. The perinent provisions of the order itself are quoted at page 98 of the brief of January 7, 1935, of the Railroad. The restraining order restrained only the *enforcement* of order No. 979 and the injunction order of the State Court. As has been pointed out order No. 979 was merely a declaratory recognition of the territorial zone in which the State power had been superseded by Federal power and the zone in which the State power and the State rate would be enforced. The order of the Circuit Court of Appeals did not in any way attempt to adjudicate the scale of rates to be invalid or unlawful, but on the contrary, recognized the existence of those rates, and required the officials of the State of Florida who were charged by law with the enforcement of the rates, to refrain from enforcing them.

We have likewise pointed out that this temporary restraining order was thereafter dissolved. The general effect of the dissolution of a temporary injunction is merely to put the parties in the same position in which they were prior to the granting of the injunction:

Robertson v. *Robertson*, 58 Ala. 68;
State v. *Duffel*, 41 La. Ann. 516, 6 So. 512;
State v. *Smith*, 188 Mo. 167, 86 S. W. 867;
Brown v. *Donnelly*, 19 Okla. 296, 91 P. 859;
Gen'l. Land Office Commrs. v. *Smith*, 5 Tex. 471.

Obviously an order temporarily retraining the enforcement of the scale of rates, which restraint was thereafter dissolved, cannot possibly deprive these claimants of the restitution to which they are justly entitled.

The Master found, both as a matter of law and as a matter of fact (R. 81, and 92), and his finding was confirmed by the District Court, that this restraining order was granted solely because of the orders of the Interstate Commerce Commission and the decrees of the District Court, and found (R. 81) that the decrees of the District Court having been reversed and the order of the Interstate Commerce Commission having been declared invalid, the restraining order of the Circuit Court of Appeals should be declared nugatory and of no force and effect at any time as authorizing or making valid the charges here made by the Railroad.

(b) The Declaratory Orders of the Florida Railroad Commission Can Afford the Atlantic Coast Line Railroad Company no Aid or Protection.

Order No. 979

The Master made findings of law (R. 77) and findings

of fact (R. 91) to the effect that Order No. 979 was declaratory only and was passed by the Florida Commission solely because of the first decree of the District Court (Former R. 44-51), and was passed in recognition of the exercise of superior Federal power in the limited area of North Florida to which the first decree of the District Court confined the operation of the order of the Interstate Commerce Commission for the purpose of sustaining it. The District Court for the reasons hereinafter set forth expressed no opinion upon the effect of this order. No claims were made for restitution arising out of log shipments during the restitution period from the limited area to which the first decree of the District Court confined the order of the Interstate Commerce Commission. Hence, it is pertinent here only because of its part in the history of this controversy, and as illustrative of the deference which the State, its officers and its interested shippers accorded to Federal authority, and the entire disregard by the Railroad Company during that period of the limitations set forth in the first decree of the District Court with respect to the territorial scope of the order of the Interstate Commerce Commission, and its utter disregard of State law in attempting to apply, in defiance of State statute and State law, statewide and without exception, the rate sustained by the District Court for application in North Florida alone.

Order No. 990

We have shown that on February 7th, 1928, the Interstate Commerce Commission amended, so as to make statewide without exception, the order which the District Court

had theretofore limited in its territorial scope to North Florida. This amendment was not made until after the institution by the State of the suit in the State court to enjoin the Railroad Company from applying the North Florida rate in South Florida until application should have been made to the State Commission, and after the institution by the Railroad Company of the suits, respectively, in the Northern District of Florida and in the Southern District of Florida. This amendment of course brought about a change of status. It was then that the Petitions for Rehearing and supplemental bills were filed in the three suits in the United States District Court for the Northern District of Georgia, setting forth the amendment by the Interstate Commerce Commission of its former order and seeking to have the order as amended enjoined, annulled and set aside. And on April 17th, 1929, the District Court entered its erroneous decree, later reversed by this Court.

And on April 20th, 1929, the Florida Railroad Commission entered in its minutes without any hearing, notice or evidence, its declaratory Order No. 990, the purpose and effect of which is hereinafter shown.

The Findings of the Master on Order No. 990

The Master made findings of law and findings of fact (R. 74, 91) holding in substance that Order 990 did and could have no effect upon the claimants' right to restitution because, in effect: (1) there was no intention on the part of the Florida Railroad Commission to change the State rates or to exercise its powers to make rates; (2) that the order of the Interstate Commerce Commission and the

decree of the District Court made rates which conflicted with the then-existing rates for intrastate shipment in Florida, and Order No. 990 was to have the minutes of the Florida Commission show that by virtue of the decree of the District Court the rates appearing on the face of the records of the Commission to be in force had been superseded by Federal power; (3) that the Florida Commission in passing the order simply recognized the fact that under the Act of Congress the rates fixed on intrastate shipments in proceedings of this kind, unless set aside, went into effect and that the Florida Commission had no right to change those rates; (4) that the order was simply declaratory of the existing status produced by superior authority; (5) that the order was consequent upon and tied to the decree of the District Court, and when that decree went down under the decision of this Court, the reversal took effect as of the time when the District Court ought to have entered the right decree in the first instance, and the decree and all things consequent upon it, including the order of the Florida Railroad Commission, were wiped out as of that time.

The District Court in its opinion rendered upon the Master's report declared it unnecessary to construe this order or Order No. 979, because, so said the District Court, the Cummer Scale of rates was confiscatory and hence not in force and effect on that account. The Appellant assigned no error with respect to any finding which the District Court made or failed to make with respect to Orders No. 979 and No. 990, and nowhere in its statement of points to be relied upon, filed with and embodied in the Transcript of Record, referred to any order of the Florida Commission.

The Context of Order No. 990 and Its Relation to Order No. 979

As has been pointed out, Order No. 979 declared, in effect, that so long as the (first) decree of the District Court should or may remain in force and unreversed, the State sovereign authority was superseded in the limited area in North Florida to which the first decree of the District Court had been limited, and declared that elsewhere in Florida, the Florida Commission would enforce the existing state rate which remained in force and effect, and directed the law officers of the State Commission to enforce it. One of the primary duties of the State Commission is to enforce state rates, and so the entry of Order 979 was an expedient, if not a necessary, declaratory order to have been entered.

It is as much the affirmative duty of the District Court to enforce state rates until they are superseded by Federal power as it is to recognize the supervening force of Federal power when and to the extent that the latter has been exercised. And after the Interstate Commerce Commission had amended its order so as to make the same statewide in its application, and the District Court had sustained that order, it became expedient, if not necessary, that there should have been some public recognition that the State was bound by the decree of the District Court, however erroneous that decree might be, For the District Court had jurisdiction of the parties and of the subject-matter, and it was the duty of the State and every citizen of it to recognize and abide

by the erroneous decree of the District Court unless and until it should be reversed by this Court:

> *United States* v. *Tarble*,
> 13 Wall. 397, 20 L. Ed. 597.

Particularly was it appropriate for some public recognition to be made by the State, in view of the welter of litigation which had been instituted consequent upon the first decree of the Georgia District Court and which was still pending. And on April 20th, 1929, the Florida Commission, without notice and without a hearing, entered the declaratory order No. 990. That order after reciting the entry of Order 979, and the amended order of the Interstate Commerce Commission prescribing intrastate rates statewide and without exception, and the petition for rehearing and the second opinion and decree of the District Court, declared:

> "And the said Railroad Commissioners of Florida deeming that the said last described *decree* of said United States District Court is erroneous, have determined to *appeal* therefrom to the Supreme Court of the United States to the end that said order of said Interstate Commerce Commission as amended and clarified as aforesaid shall be *enjoined, annulled and set aside*, to the extent aforesaid; but the Railroad Commissioners of Florida *recognize* that the said decision of said *United States District Court* sustaining the said order of said Interstate Commerce Commission *is the law*

of the land until the same be modified, set aside or reversed." (Italics supplied).

It then records that so much of Order 979 as relates to intrastate rates on logs, and the Cummer Scale of rates "so long as the decree" of said District Court "remains in force and effect and unmodified and unreversed" be and they are thereby suspended.

The order of April 20th, taken by its four corners, clearly indicates that its purpose was to recognize an existing status, viz., that by the exercise of paramount Federal power sustained by the District Court, state power, including the power and duty to enforce the state rate, was suspended and erroneously suspended, and to declare a determination on the part of the Florida Railroad Commission to remove that compelling Federal power in the only lawful way remaining, to-wit, by appeal to this Court. And if any force is to be ascribed to the words "hereby suspended" employed in the order they are to be construed, in the light of the other parts and of surrounding circumstances, to mean that the *enforcement* of the State rates, and not the existence of the State rates, was suspended.

The Intention of the Florida Railroad Commission is to be determined in the light of Statutory Powers of that Commission. The Florida Commission Has no Power to Suspend State Rates, by Order or Otherwise. Public Hearing is Necessary, and Notice to All Persons Interested and an Opportunity to be Heard Are Prerequisite to a Valid Order Changing State Rates.

The contention of the Railroad Company is not that the State Rate was *changed* but that it was lawfully suspended as an *existing* rate so as to be unenforceable for restitution when the erroneous decree was reversed.

The Statute does not confer upon the Railroad Commissioners the power to suspend State rates. They have never attempted to exercise any such power. And the Commission is expressly prohibited by Florida Statute from changing, revising or altering any state rate, except after a public hearing after due notice to the carriers and *all persons interested* of their intended action, and of the time and place of such hearing and at which the carriers and all persons interested shall be entitled to a just and fair hearing (Compiled General Law of Florida, 1927, Chapters 6722-6723; Sections 4366-4367, Revised General Statutes, 1920, Appendix A, infra). No order of the Florida Commission changing state rates is or can be valid, except one based on *appropriate evidence* duly considered and applied, conse-

quent upon a *hearing* after *notice* to all interested parties and a reasonable opportunity to be heard:

State, ex rel. Florida East Coast Ry.,
64 Fla. 112, 59 So. 385;
State, ex rel. Seaboard Air Line Railway,
93 Fla. 104; 111 So. 391;
State v. *C. B. & Q. R. Co.*,
90 Iowa 594, 58 N. W. 1060;
State v. *Milhollan*, 50 N. D. 184,
195 N. W. 292;
Central of Georgia Ry. v. *Georgia R. R. Com.*,
215 Fed. 421.

The Secretary of the Florida Railroad Commission testified that no notice was given of the entry of either Order No. 979 or Order No. 990, and that they were entered *ex parte*, without notice, hearing or evidence (R. 735). And when cross-examined by counsel for the Railroad Company, he testified that the purpose of the Florida Commission in entering the orders was to recognize the Federal authority which had superseded the authority of the State (R. 735, 737).

The Railroad Company attempts to make some point of the fact that (shown by the Stipulation at R. 734) a lawyer who was counsel for three of the claimants also appeared in the Florida litigation assisting the Attorney General of Florida in the representation of the Florida Railroad Commission, and that he assisted in the preparation of Judge Sheppard's amended return which set up Order No. 990, and that he had a hand in the preparation of a draft

of Order No. 990. Assuming that this attorney while assisting the Attorney General of Florida was an authorized agent of the persons who were his clients in separate (but related) litigations, those acts cannot: (a) ascribe to the Florida Railroad Commission and to the order taken by its four corners, a meaning which we think contrary to its intent, and certainly then and now contrary to the interest of the claimants; (b) confer upon the State Commission the power to suspend the *existence* of a state rate; (c) dispense with the evidence, hearing and notice required by the statute to support a state order changing state rates.

There is a strong presumption that every State officer in performing any act intends to obey the law, both Federal and State. And in determining the intent of State officers in the performance of a particular act, it would be assumed that the end which they sought to achieve and the means by which they sought to achieve it are lawful and not unlawful. Applying that principle here, it is obvious that the intent of the Florida Railroad Commission by its order was no more than to recognize and declare that its power to enforce the State rate had been superseded and suspended by Federal power, so long as the erroneous decree of the District Court remained in force and effect, and that any attempt to enforce the State rate had been and was suspended.

The Construction Placed on Order No. 990 By the Railroad Company and by the Florida Railroad Commission.

Contemporaneous Construction

In the mandamus proceedings filed in the District Court against Judge Sheppard (referred to *supra*, p. 24) the Railroad Company filed a response to Judge Sheppard's amended return, insisting that the case was not moot and insisted that the writ of mandamus issue. And in so doing, the Railroad Company said in part:

> "The decrees entered in the United States District Court for the Northern District of Georgia (filed April 22, 1929) on the rehearing are still subject to appeal to this Court, and those orders cannot be considered as final in any true sense until the time for appeal shall have elapsed, or until an appeal shall have been applied for and denied, or until appeal shall have been allowed and the decision of the lower court sustained. * * * The suspension (by Order No. 990) of any part of Order 979 is only 'so long as the said decree of the said United States District Court for the Northern District of Georgia, shall remain in force and effect and unmodified and unreversed.' The Railroad Commission of Florida is not yielding to the order of the Interstate Commerce Commission but is yielding only to the mandate of the Court, the finality of which it does not admit". (Alston Exhibit 12 before the Master).

This Court found in the mandamus suit that the case had not become moot and issued the writ of mandamus. 279 U. S. 822.

Judge Sheppard in the Northern District of Florida

called together a Three-Judge Court pursuant to that order. At that hearing (July 2nd, 1929) the Florida Railroad Commission filed a supplemental answer setting forth the second judgment and decree of the District Court for the Northern District of Georgia, sustaining the unlawful order of the Interstate Commerce Commission, attaching a copy of order Number 990, and asserting that as long as such order was in force and effect, the Railroad Commission would abide the terms of it, but that the Florida Railroad Commission and the State had taken an appeal to this Court, and in the event of the reversal of the decree of the Georgia District Court, the *Florida Commissioners on behalf of the several shippers of Florida affected by the order, would recoup and recover all sums paid by the shippers or collected by the Railroad Company in excess of the State rates which had been attacked in the proceedings before the Interstate Commerce Commission* (supp. 24-5).

These contemporaneous constructions demonstrate that neither the Railroad Company nor the Florida Commission then construed that the commission, by the terms of Order No. 990, had exercised or attempted to exercise its rate-making power or had done more than recognize that its power to enforce state rates had been superseded and suspended by the force of Federal power, erroneously exercised.

Subsequent Construction of Order No. 990 By the Florida Railroad Commission

Reference has been made (*supra*, p. 27) to Order No. 1032, entered by the Florida Railroad Commission on

March 5th, 1931, upon the coming down of the mandate from this Court to the District Court upon the reversal of the erroneous decree of the latter. Order No. 1032 (R. 21) was made after notice had been given and an opportunity afforded the Railroad Company to be heard (R. 20). That order declares that the Cummer Scale of rates was in effect and that it was the lawful state rate throughout the restitution period, and declares that at no time has the Commission suffered any deviation from the Cummer Scale, or suffered the Railroad Company to charge the interstate scale, except as compelled so to do by the decree of the District Court which sustained the order of the Interstate Commerce Commission, and that in view of the reversal of the decree of the District Court, the Cummer Scale was the only lawful rate effective during the restitution period.

The Rules Applicable to the Interpretation of Administrative Orders and Statutes

It is well settled that while a departmental ruling or construction is not conclusive on the courts, it will be accorded great weight:

Boston M. & R. R. Co. v. *Hooker*,
233 U. S. 97.

See also:

Louisville & N. R. R. Co. v. *Speed-Parker Co.*,
103 Fla. 439, 137 So. 724,

where this principle was applied to the construction of orders of the Florida Railroad Commission.

In interpreting an administrative order or statute, the intention of the body which made it prevails over its literal words, even against the statute or order itself:

United States v. *Burr*, 159 U. S. 78;
Hawaii v. *Mankichi*, 190 U. S. 197;
Davis v. *Florida Power Company*,
64 Fla. 246, 60 So. 759;
Knight & Wall Co. v. *Tampa Sand, L. & B. Co.*, 55 Fla. 728, 46 So. 285.

And in the construction of orders, statutes and documents, tense may be ignored in order to effectuate the intent:

Rutherford v. *Green's Heirs*, 2 Wheaton, 196;
Railroad Company v. *Herrick*, 13 Bush, 122;
Malloy v. *Chicago, etc. R. Co.*,
109 Wis. 29, 85 N. W. 130.

The Orders of the Florida Railroad Commission were consequent upon and Related to the Erroneous Decree of the District Court and the Reversal of that Decree takes effect as of the Time when the District Court should have Entered the Right Decree in the First Instance.

The effect of the reversal of a decree is to expunge it from the record, and to restore to the parties litigant their original rights. And any act or thing, including a judg-

ment, incident to and dependent upon it falls with the decree which has been reversed:

Freeman on Judgments, 5th Ed. Section 1167;
Ure v. *Ure*, 223 Ill. 454, 79 N. E. 153;
Brown Shoe Company v. *Crosby*, 30 Ga., App. 534, 118 S. E. 446;
Golde Clothes Shop v. *Loew's Buffalow Theatres*, 236 N. Y. 465, 141 N. E. 917.

Obviously all that took place after the entry of the unlawful order of the Interstate Commerce Commission and the erroneous decree of the District Court were consequent upon those instruments and related to them. No steps thenceforward taken would have been taken had the right decree been entered by the District Court in the first instance. And as the law will not permit the Railroad Company to enjoy the fruits of the erroneous decree, it will not permit it to enjoy the benefits of anything done in consequence of it.

The Effect of Order No. 990

We submit that in the light of the foregoing, both the findings of law and the findings of fact made by the Master as to the intent and purpose and effect of Order No. 990 were correct, and that they have not been overturned by the District Court and there is no reason for them to be overturned here, even if the Railroad Company had founded an Assignment of Error upon the failure of the District

Court to overturn them, or included them in its statement of points to be relied upon filed with and embodied in the Transcript of Record.

Examining the order as a whole, and considering the welter of litigation and confusion then pending, and the state of the Florida law with respect to the Florida Commission, it is obvious that the only effect of it was to recognize and declare an existing status, to-wit, that by the exercise of paramount Federal power sustained by the District Court, State power, including the power and duty of enforce the statewide rate, was suspended and erroneously suspended. And that immediate steps were being taken to remove the invasion of the supervening Federal power by the judgment of this Court. The *enforcement* of the State rate was the thing with which the order meant to deal and not with the existence of it. Any other construction must assume that the Florida Commission attempted to usurp to itself the power to suspend the existence of rates, or in its attempt to obey Federal law it was attempting to violate state law; and that by the very paper in which it denounced as erroneous the decree of the District Court and its intention to appeal from it, the Florida Commission did abandon the fruits of any appeal which its shippers would enjoy as the result of a successful prosecution of it. Obviously all that happened after the entry of the unlawful order of the Interstate Commerce Commission and the erroneous decrees of the District Court was consequent upon those erroneous decrees, and when they went down, all else that happened afterwards went down with them.

POINT VII.

THE DISTRICT COURT AND THE MASTER FOUND THAT THE BURDEN OF PROOF WAS ON THE COMPLAINANTS TO SHOW "WHAT SHOULD IN RIGHT AND JUSTICE BE RESTORED TO THEM, THE CASE STANDING MUCH AS THOUGH THEY WERE SUING IN A COURT OF LAW FOR OVERCHARGES." THE DISTRICT COURT FOUND THAT THIS BURDEN HAD BEEN MET.

The railroad devotes several pages of its brief (pages 104-109, Brief of January 7, 1935) to the proposition that when the case was re-referred the burden of proof was on the claimants and that they did not meet this burden. It fails to refer to the finding of the District Court, which we think amply meets this contention. That Court said (R. 350):

> "The original burden of proof was upon the claimants of restitution. When they showed what they had paid, and that it was in excess of the Cummer scale, the apparent state rate, the burden shifted to the Railroad Company, which assailed the Cummer scale and overturned it as an obligatory rate. Under the conditions of the re-reference the burden then returned to the claimants to show what should in right and justice be restored to them, the case standing much as though they were suing in a court of law for overcharges."

That Court then discusses the evidence, confirms the report of the Master which had dealt with the evidence

at length, and directs the entry of the decree based on the evidence and the findings. The Master found (R. 192-193):

> "The burden is upon the claimants to show that they were not just and reasonable charges, and were extortionate and oppressive and upon their failure to do so they would not be entitled to any recovery. (See Centre County Lime Co. v. Public Service Commission, 157 Atl., 815-819.) Should claimants carry this burden and make such showing the burden is also upon the claimants to further show what would have been just and reasonable charges before any recovery can be had."

We have always felt that in a restitution proceeding, where the money was collected under and by reason of the erroneous decree of the Court, the burden was upon the person who had so collected money to justify his retention of any part of it. But certainly the railroad cannot complain here where the Court and the Master found the burden of proof in connection with the decree actually entered to have been on the claimants, and by its opinion and decree found that burden to have been met.

POINT VIII.

BOTH THE MASTER AND THE DISTRICT COURT IN MEASURING AND AWARDING RESTITUTION TOOK INTO CONSIDERATION THE ELEMENT OF DISCRIMINATION AGAINST INTERSTATE COMMERCE.

The railroad insists (pages 110-118, Brief of January 7, 1935) that the District Court in entering its decree did

not take into consideration discrimination against interstate commerce.

The reply to that is what that Court itself said on the subject (R. 351);

> "The prohibition of federal law aimed at discrimination by state rates against interstate commerce is not easily applicable to such a case as this, because the existence thereof involves questions so technical and complex as not to be well examinable in a court trial and is referred by the statutes specially to the Interstate Commerce Commission; but the fact that such discrimination is prohibited is a matter that should have some bearing on the present problem."

The District Court (R. 350) found that in establishing the proper charge for these past shipments, the statutes, both state and federal which control the making of future rates, should be given consideration. We think we have demonstrated in our main brief that this finding was erroneous, but certainly the railroad cannot complain about it. *Arkadelphia Milling Co.* v. *St. Louis & S. W. R. Co.* 249 U. S. 134, *text* 149.

POINT IX.

THERE IS NO INCONSISTENCY IN THE OPINIONS OF THE DISTRICT COURT.

The Railroad Company points out that the District Court in its final opinion here gave consideration and weight to the fact that the Cummer Scale had been original-

ly named by it and voluntarily maintained for many years, while the shippers were making their investments and establishing their businesses upon the faith of it. It then asserts that in the first opinion of that same Court (30 *F.* (2d) 116), in passing upon the unlawful order of the Interstate Commerce Commission and erroneously upholding it, that Court held that the serious effect of the increased rate upon the business of complainants and their investments was insufficient to overturn the order of the Interstate Commerce Commission. On this basis it accuses the District Court of inconsistency.

In the case last mentioned the District Court was dealing with an order of the Interstate Commerce Commission prescribing a future rate in a direct attack upon that order. That Court did not there attempt to determine whether the level fixed by the Commission for future application was too high or too low. The sole question was the authority of the Commission to fix the future rate. It therefore said that it would not invalidate the order solely because of its effect upon established businesses. In the case at bar the District Court was not determining the validity of any order of the Interstate Commerce Commission, for that order had been declared to be invalid by this Court. As the District Court itself pointed out, it was determining a reasonable charge for a past transaction. It did not pretend to base its determination solely upon the effect of the charge on established businesses, but did give consideration to that effect.

We point out that in the hearing before the Master after the re-reference, these claimants for the first and only time in any proceeding relating to the Florida log rate

offered primary evidence as to the cost of transporting logs in Florida. On the hearings before the Interstate Commerce Commission, these claimants have confined themselves largely to criticisms of the cost studies produced by the carrier and to showing the character of the log movement in Florida. When the District Court in this case announced that it was going to determine the proper charges upon the basis of quantum meruit, the claimants produced primary evidence in great quantities, relating to every phase of the log traffic, and, as the Master and the District Court found, made out a case upon that issue. We think that the District Court misapplied the law and that it did not give full effect to the evidence and that we were entitled to a great deal more than was awarded us by way of restitution, but at least the District Court found that we were entitled to the restitution which it did award upon the basis upon which it was awarded.

POINT X.

THE ORDER OF THE INTERSTATE COMMERCE COMMISSION IN THE RE-OPENED PROCEEDINGS, AFTER THE TIME OF THE SHIPMENT OF THE LOGS HERE INVOLVED, FIXING THE RATES FOR THE FUTURE AND THE SUBSEQUENT DECISIONS OF THE COURT UPHOLDING THAT ORDER, CAN HAVE NO RETROACTIVE EFFECT UPON THE RESTITUTION TO BE AWARDED HERE.

We have already discussed this topic under Point 8 of our main Brief (pages 123-127) and there pointed out that the Act authorizing the Interstate Commerce Commission to prescribe intrastate rates on the ground that they discriminate against interstate commerce authorizes it to act

only "after full hearing" and to prescribe the rate "thereafter to be charged".

A retroactive order of the Commission prescribing rates is void:

Baltimore & Ohio R. Co. v. *United States*,
284 U. S. 195.

The only valid orders made by the Interstate Commerce Commission here, viz., in July, 1932, and in January, 1933, are by their terms expressly limited in their operation to the future. The report of the Interstate Commerce Commission in July, 1932, recognizing that the Cummer Scale of rates was then in force and effect and that its action could not be retroactive, said (page 203 of exhibits):

> "We further find that the intrastate rates on logs over 6 feet in length, except walnut, cherry and cedar, applicable between points on the Atlantic Coast Line in Florida for distances of 170 miles and less *are, and for the future will be*, unjustly discriminatory against interstate commerce, and that such unjust discrimination can and should be removed by the establishment etc." (Italics supplied).

The report of the Interstate Commerce Commission dated July 5th, 1932, confirmed the former findings of the Interstate Commerce Commission with respect to the reasonableness of the *interstate rate* prescribed by the former order. But neither that nor any other report attempted to

confirm the former findings or any of them with respect to the former orders of the Commission which had been set aside pursuant to the judgment of this Court.

And the order of the Interstate Commerce Commission made upon its report dated July 5th, 1932, as amended by its order dated July 28th, 1932 (Appendix B, infra), was entirely prospective in its nature, was to take effect on September 15th, 1932, and the mandatory portions of it required the Railroad Company to put in force and maintain the rates to be prescribed upon not less than thirty days' notice to the Commission and to the general public. Neither in its reports nor in its orders did the Interstate Commerce Commission attempt to confirm its report and order of August 2nd, 1928, as amended or in anywise to make findings or orders having retrospective application or fixing rights or remedies antecedent to September 15th, 1932, the effective date of its order.

Furthermore, an order of a Commission or decision of a Court is immaterial as to the reasonableness of the rate theretofore charged:

Ex Parte Lincoln Gas & Electric Co.,
257 U. S. 6;
Anniston Mfg. Co. v. *Southern Ry. Co.*,
(Ala.) 40 So. 965;
Coon v. *O'Brien* (Neb.), 186 N. W. 340.

The railroad made no application to change the intrastate rates in the proceedings before the Interstate Commerce Commission which resulted in its invalid order of August 2, 1928, but stated as its position of record that it

proposed to continue them in effect if permitted so to do (Former Record 495-496) and the Interstate Commerce Commission so found (Former Record, 21).

So obviously the order made in July, 1932, by the Interstate Commerce Commission for future application could have no retroactive effect upon the restitution here sought in connection with the shipments of logs between the dates of February 8, 1929, and March 7, 1931.

Where Restitution is Sought There is no Necessity for Resort to the Commission

In the brief of the Railroad, dated January 2nd, 1935, (pages 27 to 32) the contention is made that the claimants are required to first resort to the Interstate Commerce Commission for their restitution here sought, and, consequently, that the District Court had no jurisdiction to award restitution—no application having been made to the Commission.

The cases there cited were cases where *reparations*, as distinguished from *restitution*, were sought, and there was an established and published rate or regulation in force, which was claimed to be unreasonable. The rate or regulation so involved applied to *interstate* shipments. And the complaint was that the carrier had violated the terms of the Interstate Commerce Act. Under those circumstances, this Court held that primary resort must be made to the Interstate Commerce Commission. This was so under the Interstate Commerce Act and necessary to secure the uniformity of such rates or regulations which it was found to be the purpose of the Act to provide. (The pertinent pro-

visions of that Act are set forth in Appendix C hereof.)

Under the provisions of the Act, the Interstate Commerce Commission has power and authority only to make investigation and to award reparation where the carrier is charged by the shipper with a *violation* of the Interstate Commerce Act. In this case the carrier is not charged by these claimants with having violated the Interstate Commerce Act, and the Act with respect to reparations is not applicable to *intrastate* shipments.

Thus, in *Penn. R. Co.* v. *Mitchell Coal & C. Co.*, 238 U. S. 251, an action was brought in the State Court for damages sustained by reason of rebates to other shippers. The shipper recovered a judgment and the Court said that the action was brought and the judgment rendered under the law of the State "and the complaint now made is that damages were awarded in respect of several shipments which were not *intrastate*, but destined to points outside the state and as to which no recovery could be had in this action consistently with the Interstate Commerce Act. See Mitchell Coal & Coke Co. v. Pa. R. Co., 230 U. S. 247, 57 L. Ed. 1472 • • • ."

The Court then pointed out that the plaintiff's statement of claim described the shipments as *intrastate* and the lower court found that all of the shipments were *intrastate*. And this Court in affirming the judgment said:

> "We find nothing in the record to sustain the contention that some of the shipments were *interstate* • • • .
>
> "In this situation the conclusion reached by the State Courts cannot be disturbed."

By examining the case of *Mitchell Coal & Coke Co.* v. *Pa. R. Ca.*, 230 U. S. 247 (cited in the above case), it will be seen that a different rule applies where *intrastate* and *interstate* shipments are involved. Thus, in *Mitchell Coal & Coke Co.* v. *Pa. Ry. Co.*, 230 U. S. 247, it appears that the shipper brought suit in the Circuit Court of the United States against the Railway Company, concerning *interstate* shipments and claiming damage occasioned to it by payment of rebates to other shippers. In that case the contention was made that preliminary resort had not been made to the Commission and, consequently, the Court had no jurisdiction. This contention was upheld as to the *interstate* shipments.

Thus, it appears from a consideration of the two cases that where *interstate* rates are involved, primary resort to the Commission is required; but where *intrastate* rates are involved, primary resort to the Commission is not required.

Another case in point is that of *Loomis* v. *Lehigh Valley R. Co.*, 208 N. Y. 312, 101 N. E. 907. In that case the shipper sued the carrier because of the carrier's common law duty to furnish bulkheads to be used in the cars. The shipper had made the bulkheads itself and sued for the cost. The shipments involved were *intrastate* as well as *interstate*. The Court of Appeals of New York held that the plaintiffs were entitled to recover with respect to the *intrastate* shipments, but reviewed the Federal cases and held that the shipper was not entitled to recover with respect to *interstate* shipments, without preliminary resort to the Interstate Commerce Commission.

In the meantime the New York Public Service Commission had issued an order respecting such cases, but with respect to intrastate shipments the Court held:

> "This power of fixing rates and making regulations concerning intrastate traffic is clearly within the jurisdiction of our State Public Service Commission, but their determinations are not retroactive."

The case was taken to this Court and is reported, 240 *U. S.* 43. There this Court said:

> "The Court of appeals held that the common law imposed upon the railroad the duty of furnishing cars equipped with inside doors or bulkheads for transporting grain or provisions in bulk, and unless local or Federal statutes had established different rules, plaintiffs were entitled to recover. Having considered the statutes, it concluded the local act created no bar to recovery on account of the *intrastate shipments*, but that Congress had assumed such control over *interstate shipments* as to deprive the state courts of power to consider claims arising out of them. 208 N. Y. 312, 101 N. E. 907. The judgment of the appellate division in favor of plaintiffs for total cost of material supplied by them was modified accordingly and the record and proceedings remitted to the supreme court, Ontario county."

And this Court concluded its opinion by saying:

"We find no error in the judgment below and it is affirmed."

This case makes a clear distinction between *intrastate* and *interstate shipments* with respect to the necessity of preliminary resort to the Interstate Commerce Commission.

But the conclusive answer to the Railroad's contention in the case at bar is that the District Court had jurisdiction to right the wrongs which it had done, that the duty which is cast upon the Court by the theory of restitution requires the Court to give the relief here sought, and consequently rules as to reparations and the necessity for resort to the Commission have no application whatsoever here.

In the original proceedings before the Interstate Commerce Commission which resulted in its invalid order of August 2nd, 1928, the Georgia Public Service Commission, the complainant in that proceeding, made it clear that the end sought to be achieved by the complaint was the extension of the then effective intrastate rate, (the Cummer Scale) interstate from Florida into Georgia (former Record 416-417). It likewise made it clear that the proceeding was "not a revenue case" (former Record 417). And in that proceeding, the Atlantic Coast Line Railroad Company disclaimed any contention that the Cummer Scale of rates was not compensatory (former Record 491). Also it stated that it was making no proposal to change the Florida intrastate rates (former Record 495-496), and the Interstate Commerce Commission so found (former Record 21). There was substantially no revenue evidence offered in the original proceedings, except that which related to trainload

movements. Such was expressly noted in the opinion of this Court, which ordered the invalid order of the Interstate Commerce Commission to be set aside (282 U. S. 194). Indeed, this Court in the subsequent case of *United States* v. *State of Louisiana*, 290 U. S. 70, in examining the decision in *Florida* v. *United States*, declared that proceeding to have involved a discrimination which,

> "was essentially one of undue prejudice against shippers, confined by the evidence to rates prevailing in northern Florida. It involved only one railroad and one commodity. It was not the general revenue proceeding authorized by Section 15a."

The Railroad Company made no application to the Interstate Commerce Commission with respect to the State rates until March 5th, 1931, after the coming down of the mandate of this Court which reversed the erroneous decree of the District Court. The Railroad Company's response (filed March 7, 1931) to the claimants' several motions for restitution assert (R. 41) upon information and belief that the Georgia Commission had filed with the Interstate Commerce Commission a petition to reopen the proceeding on Docket No. 18364 and to proceed to make the findings "indicated in said opinion of the Supreme Court of the United States to be necessary and proper to be made"; and also, that the Railroad Company had filed with said Commission a motion on its own behalf praying in effect "that said findings be made and that said Florida intrastate rate known as the Cummer Scale be set aside under Sections 3

and 13 of the Interstate Commerce Act." Those allegations of the Railroad Company's response were not proven. We cannot find that the Railroad Company filed in these restitution proceedings any copy of the motions above referred to which had been filed by the Railroad Company and by the Georgia Commission before the Interstate Commission. But the Railroad Company will not deny that these motions were filed on or about March 5th, 1931, and that the relief prayed in the Railroad Company's motion was limited to the following relief: (a). that the Interstate Commerce Commission proceed to make such findings and issue such further reports and orders as it might deem requisite or necessary; (b) that the Commission prescribe such intrastate rates as might be lawful; and (c) that the Commission issue such other and further reports and orders as it might deem proper.

Nor will the Railroad Company deny that the motion of the Georgia Public Service Commission was filed on or about March 5th, 1931, and sought the same relief as that sought by the Railroad Company, except that the Georgia Commission demanded that the Federal Commission prescribe just, reasonable and non-discriminatory *interstate rates* which should be no higher than the rates concurrently in effect in intrastate commerce in Florida. Even then neither the motion of the Railroad Company nor that of the Georgia Commission asserted that the Cummer Scale was unreasonable or unremunerative or non-compensatory.

The proceedings before the Interstate Commerce Commission by the order of that Commission dated April 6, 1932, were re-opened "for further hearing." (R. 61). A large amount of additional testimony was presented by the

Railroad Company in those re-opened proceedings (186. I. C. C. 157-198, and 190 I. C. C., 588-600, pages 157 to 212 of Exhibits), relating, for the most part, to revenue matters as of a time subsequent to the order of August 2nd, 1928, and all directed to the fixing of a rate for the future. There is nothing of record to show that any retroactive order was sought, and no such order was sought.

As we have shown supra, the re-opened proceedings resulted in the findings and report of the Commission dated July 5th, 1932, in which the Commission confirmed its former findings with respect *to interstate rates, but was careful to limit its findings with respect to intrastate rates to findings in praesenti and in futuro,* (p. 203 of Exhibits) and to limit its order to the intrastate rates "thereafter to be charged" by the carrier. (Appendix B, *infra*).

Thus, the order of the Interstate Commerce Commission in the re-opened proceedings being based upon new and additional evidence, the findings of the Commission cannot be made retroactive, even if that Commission had attempted to make its order retroactive. Consequently, such cases as *Railroad Comm.* v. *Maxcy*, 282 U. S. 249, relied upon by the Railroad, (Brief of January 2, 1935, page 32), can have no application here, even if they were otherwise applicable, which they are not. In that case an interlocutory order was continued in force by this Court, and the case was remanded to the District Court for that Court to make findings, 281 U. S. 82. And upon *remand findings were made, but not upon new or additional testimony as is the case here,* 282 U. S. 249. The authorities already cited, supra, sufficiently answer the unfounded contention of the Railroad. And neither this Court nor the District

Court in the case at bar purported to continue the invalid order of the Interstate Commerce Commission in force until new evidence could be taken and new findings be made by the Commission. On the contrary, both this Court and the District Court refused to grant the application of the Railroad seeking that very relief, and refused to invade State domain or interfere with the State rate (the Cummer Scale) until the Commission had re-opened the proceedings, taken new evidence, and made the required findings. Such was in accordance with the decisions of this Court, *Board of R. R. Comm. of N. D.* vs. *Great Northern Ry. Co.*, 281 U. S. 412.

The Railroad Company also relies upon

Lawrence v. *St. Louis-San Francisco R. Co.*, 274 U. S. 588; (s. c.) 278 U. S. 228.

That case has no application here. There the bill filed by the railway company prayed that the defendants be enjoined from compelling plaintiff to submit to the jurisdiction of the Corporation Commission with respect to the removal of its railroad shops from one point to another. An interlocutory injunction was entered by the District Court and upon an appeal from such *interlocutory* injunction this Court held that the interlocutory injunction was improvidently entered. The cause was remanded for further proceedings. Pending the appeal the shops had been removed by the railway company. Upon the coming down of the mandate reversing the order of temporary injunction, the defendants applied to the District Court for an order requiring, that before any further proceedings be taken in the

cause, the railway company rebuild the shops, rebuild the tracks, and return to its original location all the machinery and employees removed by reason of the interlocutory injunction, and restore the running of its trains so that its former division point (Sapulpa) would again be the division point for the running of trains as it was before the issuance of the interlocutory injunction. The District Court denied the motion and issued an order that the railway company, as a preliminary step to the further hearing of the cause, apply to the Oklahoma Corporation Commission for the dissolution of the restraining orders theretofore made by it (prior to the temporary injunction), and for the ratification of the removal which had been effected. The railway company made the application, but the Corporation Commission, at the instance of the defendants in the injunction proceedings, declined to hear the application of the railway company until the railway company should have returned its shops and division point to Sapulpa. The Railway company then filed in the District Court its supplemental bill setting forth the facts above mentioned and other facts, and the case went to final hearing. At the final hearing the permanent injunction prayed by the bill was granted by the District Court. Upon appeal to this Court the Final Decree of the District Court awarding the permanent injunction was sustained (278 U. S. 228).

We can see no analogy between the Lawrence case and the case at bar. There is nothing inconsistent with the holdings of this Court upon the first appeal that the *temporary* injunction was improvidently entered and its holding upon the second appeal that the *permanent* injunction

was properly entered. Until a final decree is entered of course the parties and the subject matter are before the Court, and the Court may exercise reasonable discretion in the progress of the cause and the time when and the circumstances under which steps in the cause may be taken. And this Court held that the refusal of the Oklahoma Commission to hear the application of the railway company *pendente lite* was tantamount to an order refusing leave to remove, and that such an order would have been a violation of the Commerce Clause. This Court also declared that it must have seemed to the District Court on the motion to return the shops that upon a final hearing a permanent injunction would issue, and that under these circumstance the District Court was warranted in withholding the determination of the restoration of the shops until the final hearing of the cause.

We have a wholly different situation here. The decree of the District Court in the case at bar was a final decree and was determinative of all issues between the parties. And when the mandate of this Court came down, the reversal was final and conclusive and terminated the proceedings, except to the extent that it was necessary to continue them for the purpose of making restitution. The reopening of the proceedings before the Interstate Commerce Commission after the coming down of the mandate was by no means a continuation of the proceedings in the District Court. The report and order of the Interstate Commerce Commission entered on July 5th, 1932, in the reopened proceedings spoke only *in praesenti* and *in futuro*, and when that report and order (as amended) was attacked in the courts, it was attacked in new and independent pro-

ceedings in which the Railroad Company intervened and did not pretend to assert that such new proceedings were ancillary to or consequent upon the suit in which was entered the erroneous final decree which had been reversed by this Court. The decisions in the *Lawrence cases*, supra, are entirely inapplicable to the case at bar.

CONCLUSION

The matters set forth in the briefs of the Appellant and Cross-Appellee, Atlantic Coast Line Railroad Company, afford no reason why restitution should not be made to the Appellees and Cross-Appellants upon the principles set forth in the main brief of the Appellees and Cross-Appellants.

Respectfully submitted,

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APPENDIX A.

Sections 6722 and 6723, Compiled General Laws of Florida, 1927.

"6722. (4636.) Notice to common carriers before changing rates.—The said commissioners, before changing, revising, fixing, adopting or allowing any such schedule or prescribing any such rules and regulations shall give public notice of their intended action in such newspapers and for such time as shall be deemed fair and reasonable by said commissioners to all common carriers to be affected and to the public generally, of the times and places of their meetings and all common carriers and persons interested shall be entitled to a just and fair hearing before said commissioners, and whenever any full schedule shall have been made, changed or revised, adopted or allowed, or any rule or regulation prescribed as aforesaid, the commissioners shall in every instance give the date on which the same will go into effect. (Gen. Stat., Sec. 2900, amended by Ch. 6527, June 7, 1913, Sec. 7.)

6723. (4637). Publication of notice may be dispensed with.—Where the public interest does not require that public notice shall be given in a newspaper, such publication may be omitted, and the commissioners shall give personal notice to the common carriers, and other parties interested. The commissioners shall furnish to all of said railroad companies notice for the building of such freight and passenger depots, houses and platforms and to all said water carriers notice for the building of such landings, wharves and houses, and to all common carriers notice of such changes

of schedule for the arrival and departure of all trains and boats as may in the judgment of the commissioners be required to secure close connection between railroads or between railroads and water carriers, for the convenience and comfort of the public, and all courts in this State shall only require proof that such notices were duly served. (Gen. Stat., Sec. 2901, amended by Ch. 6527, June 7, 1913, Sec. 8.)."

APPENDIX B.

Order of Interstate Commerce Commission, dated July 5th, 1932, as amended by order dated July 28th, 1932.

"ORDER

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 5th day of July, A. D. 1932

No. 18364

GEORGIA PUBLIC SERVICE COMMISSION

v.

ATLANTIC COAST LINE RAILROAD COMPANY

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report on further hearing containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That said defendant be, and it is hereby notified and required to cease and desist from practicing the unjust discrimination found in said report to exist in the relation of intrastate and interstate rates and to establish, put in force, and maintain rates for the transportation of logs over

six feet in length, except walnut, cherry, and cedar, in carloads, minimum weight 40,000 pounds, in intrastate commerce within and throughout the state of Florida for distances of 170 miles or less, which shall be the same as those set forth in Appendix F to the aforesaid report on further hearing.

And it is further ordered, That this order shall continue in force until the further order of the commission.

By the commission.

George B. McGinty, Secretary. (Seal.)"

"ORDER

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 28th day of July, A. D. 1932.

No. 18364

GEORGIA PUBLIC SERVICE COMMISSION

v.

ATLANTIC COAST LINE RAILROAD COMPANY

It is ordered, That the third paragraph of the order heretofore entered in this proceedings on July 5, 1932, be, and it is hereby, amended so as to read as follows:

And it is further ordered, that this order shall become effective on or before September 15, 1932, and that defendant shall comply therewith upon not less than thirty days' notice to this commission and to the general public by filing and

posting tariffs in the manner prescribed in section 6 of the interstate commerce act, and that this order shall remain in force until the further order of the Commission.

It is further ordered, That, in all other respects the aforesaid order of July 5, 1932, shall remain in force and effect.

It is further ordered, That Appendix F to the report herein on further hearing be, and it is hereby, amended so as to provide that the rates named in said Appendix F shall be subject to a minimum weight of 40,000 pounds.

By the Commission.

George B. McGinty, Secretary. (Seal)."

APPENDIX C.

Interstate Commerce Act, Sections 9, 13 (1) and 16 (1), (U. S. C. A., Title 49, Sections 9, 13 (1) and 16 (1)).

"Sec. 9. Remedies of persons damaged; election; witnesses. Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding. (Feb. 4, 1887, c. 104, Sec. 9, 24 Stat. 382.)

"Sec. 13; Par. (1) *Complaint to commission of viola-*

tion of law by carrier; reparation; investigation. Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

"Sec. 16. Orders of commission and enforcement thereof; forfeitures.—(1) *Orders by commission for payment of damages.* If, after hearing on a complaint made as provided in section 13 of this chapter, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."